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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 456

HORACE CHANDLER DAVIS,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HORACE CHANDLER DAVIS,
*Petitioner.*
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# In the Supreme Court of the United States

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No.

HORACE CHANDLER DAVIS,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Horace Chandler Davis prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 21, 1959.

### Opinions Below

The opinion of the District Court for the Western District of Michigan is not officially reported. It appears at page 62a of the Joint Appendix. The opinion of the Court of Appeals for the Sixth Circuit (pp. 8-17, *infra*) is not yet officially reported.

## Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on August 21, 1959 (p. 18, *infra*). On September 16, 1959, Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to and including October 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rule 22 (2).

## Questions Presented

Whether, in light of the United States Constitution, Amendment I, an investigative committee of the Congress of the United States has power to compel testimony by a private citizen as to his ideas, or as to his associations and activities directed to recommending his ideas to others.

Whether, in light of the First Amendment, an investigative committee of the Congress retains any governmental authority whatever while conducting a public hearing designed to direct unreasoning scorn, obloquy and ridicule by the public upon a political doctrine, and upon a witness if he does not repudiate the doctrine.

## Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution, as well as 2 U.S.C. § 192 and the relevant portions of Rule XI of the House of Representatives, H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18, are set forth in Appendix A, *infra*, pp. 6-7.

## Statement

This case originates in petitioner's appearance May 10, 1954, in Lansing, Michigan, before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Petitioner appeared pursuant to subpoena and was not accompanied by counsel. He announced early in the hearing his opinion that the Committee lacked legitimate power to compel testimony on political beliefs and associations, and his intention to refuse to answer such questions. Among the questions he refused thereafter to answer was the question, "Are you now a member of the Communist Party?" He explicitly refrained from exercising the Fifth Amendment privilege to refuse to testify against himself.

Petitioner was indicted by the Grand Jury for the Western District of Michigan on September 2, 1955. The indictment charged the crime of Contempt of Congress, under 2 U.S.C. § 192, and specified twenty-six instances at the hearing described of petitioner's refusal to answer questions. Petitioner was tried without a jury before the District Judge, who found him guilty, and imposed a fine of $250.00 and a jail sentence of six months. Appeal was taken to the Court of Appeals, which affirmed the conviction, relying on *Barenblatt* v. *U.S.*, 360 U.S. 109, recently decided by this Court.

## Reasons For Granting The Writ

1. This Court based its decision in *Barenblatt* v. *U.S.*, 360 U.S. 109, on an interpretation of the First Amendment limitations upon Congress which is in conflict with its holding in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642. The conflict can be resolved only if considered anew by this Court.

2. That speech which the First Amendment was primarily intended to protect is exchange of opinion between citizens on matters of public policy as a necessary preliminary to formulating the will of the ruling electorate. The protection of this category of speech by the First Amendment may not be subordinated to any governmental exigency; for the government's power derives from the will of the people. "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Madison, Annals of Congress, 3d Cong., 934. See also Meiklejohn, Free Speech and its Relation to Self-Government, 25, 26. Despised or anti-democratic opinions are included among those protected, that they may enter into the contention of ideas from which the people's decisions emerge. *U.S.* v. *Roth*, 354 U.S. 476, 484. See also Mill, On Liberty.

3. The House Committee on Un-American Activities investigates primarily "subversive and un-American propaganda"—which can only mean advocacy before the citizenry of certain censured ideas. H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18 (pp. 6-7, *infra*). The usual interrogation by the Committee, and in particular the interrogation of the petitioner in the present case, confronts the witness with the suggestion that he has advocated, or belonged to organizations which advocated, the "un-American" ideas. This is in effect a test oath, a demand that the witness either repudiate the ideas, or accept the opprobrium attached to them by avowing them or refusing to answer. By conducting the hearings publicly the Committee apprises the people that to entertain "un-American" ideas is dangerous. *Watkins* v. *U.S.*, 354 U.S. 178, 197. The additional message, that to entertain these ideas is shameful or disgusting, is equally intolerable: an agency of government may urge

upon the people reasons for favoring one side or another of an issue, but may not urge the people to withdraw from considering the issue at all.

4. The described violation of the First Amendment could not be removed by the Committee's operating under a reworded charter, or altering its forms, so long as the nature of the hearings was unaltered. The violation occurs as soon as the hearing becomes a political test oath and expose; regardless of the witness's response, the proceeding is invalidated. There can be no crime of contempt for refusal to cooperate with an invalid proceeding.

5. The question is important because the Committee's hearings continue on the same pattern in the present Congress and the same damage to the people's free speech is done.

## Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE CHANDLER DAVIS,
*Petitioner*

## Appendix A

CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODE, TITLE 2, SEC. 192

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

EXCERPTS FROM RULES OF THE HOUSE OF REPRESENTATIVES, 83d CONGRESS, RULE XI, 17 (b):

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto

that would aid Congress in any necessary remedial legislation.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. . . .

## Appendix B

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED AUGUST 21, 1959

The appellant was indicted under a twenty-six count indictment for contempt of Congress in violation of Sec. 192, Title 2, U. S. Code. He was tried by the Court without a jury. The District Judge treated the twenty-six counts as charging only one offense, made a finding of guilty, and imposed a fine of $250.00 and imprisonment for a period of six months. Judgment was stayed pending this appeal.

Appellant had been a student at Harvard College from 1942 to 1945 and had received his B. S. degree therefrom. He received the degree of Ph. D. from Harvard University in 1950. Thereafter, he had been employed as a teacher of mathematics at the University of Michigan.

Count 1 of the indictment states that a standing Committee on Un-American Activities was duly elected and certified by the House of Representatives of the 83d Congress of the United States in accordance with the provisions of Public Law 601, 79th Congress, Chapter 753, 2nd session, known as the Legislative Reorganization Act of 1946; that beginning on February 23, 1953, said Committee commenced public hearings into "Communist Methods of Infiltration into Education", in accordance with provisions of Public Law 601 and the authority and power of said committee, as provided by Rule XI of House Resolution No. 5; that thereafter, on May 10, 1954, public hearings were held in Lansing, Michigan, by a duly appointed and authorized subcommittee of said Committee on Un-American Activities; that the appellant appeared before said subcommittee on May 10, 1954; that during the course of said hearing appellant was asked the following pertinent question to the inquiry:

"During the period of time that you were at Harvard as an undergraduate, say between 1942 and 1945, were you aware of the existence on the campus or in Cambridge of an organized group of the Communist Party made up chiefly of members of the student body of Harvard?"

and that the appellant deliberately and intentionally refused to answer said question claiming privilege under the First Amendment to the Constitution of the United States and persisted in such intentional refusal although directed to answer.

Each of the remaining counts incorporated the allegations of the first count with respect to the creation of the standing Committee on Un-American Activities and its subcommittee and the hearing on May 10, 1954, and in addition stated that the appellant was asked another pertinent question to the inquiry which he deliberately and intentionally refused to answer.

The questions set out in counts 1 through 11 dealt with alleged Communist activities at Harvard University and the appellant's awareness of the existence of such groups and certain named persons as having been active in such groups. The questions set out in counts 12 through 20 dealt with appellant's connection with and participation in the dissemination of a pamphlet entitled "Operation Mind" which called upon the people of Detroit to oppose the Committee's presence in the Detroit area, and which bore the notation, "Distributed by University of Michigan Council of the Arts, Sciences, and Professions, and the Civil Liberties Committee of the University of Michigan." The questions in the remaining counts dealt with certain political beliefs and associational activities of the appellant including the question whether the appellant had any time during 1952 or 1953 solicited membership in the

Communist Party of any faculty member or student of the University of Michigan, whether the appellant was a member of the Communist Party and whether he had ever been a member of the Communist Party. The appellant filed a motion to dismiss the indictment, which was overruled by the District Judge, and also entered a plea of not guilty.

There is no factual dispute between the parties, and the appeal presents purely a question of law. The case was argued to this Court on April 21, 1958, but due to the pending review in the United States Supreme Court of the case of *Barenblatt* v. *United States*, 252 F. (2) 129, C. A. D. C., cert. granted, 356 U. S. 929, which involved some of the same issues as are raised in this case, a ruling on the present appeal was held in abeyance until the Supreme Court decided *Barenblatt*. Its opinion in *Barenblatt* v. *United States* was handed down on June 8, 1959, and is reported at 360 U. S. 109.

Appellant first contends that the Committee was acting under an excessively broad charter, which exceeded the bounds of legislative power; that when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter; that the authorizing resolution of the Un-American Activities Committee and Rule XI which authorized the subcommittee were so broadly drafted and loosely worded as to fail to point out with sufficient particularity the Committee's jurisdiction and purpose, thus violating the rule against vagueness. *United States* v. *Rumely*, 345 U. S. 41; *Watkins* v. *United States*, 354 U. S. 178, 200-205. This contention has been decided adversely to appellant's contention in *Barenblatt* v. *United States*, supra.

The decision in *Barenblatt* v. *United States*, supra, also disposes of appellant's contention that his conviction in this case violates the freedoms of speech and of the press guaranteed by the First Amendment.

In his opening statement the chairman of the subcommittee made the following statement,

> "However, if any witness desires to decline to answer any question propounded, if that witness will so indicate, not through counsel, but through his own words, the fact that he does object, that will be duly noted and recorded. I must caution the witnesses, however, that the committee will recognize as an objection only the Fifth Amendment. We are repeatedly confronted by witnesses who invoke practically all the amendments and the entire Constitution itself."

Appellant contends that this assumption of an absolute power to investigate subject only to the Fifth Amendment was an unwarranted usurpation of power, in that the power to investigate is subject to the First Amendment as well as the Fifth, and that appellant's resistance thereto was accordingly lawful. *Watkins* v. *United States*, supra, 354 U. S. 178, 188.

The statement referred to is not properly relied upon. Committee member Moulder promptly thereafter made the statement, "I want the record to show that I disagree with the chairman's position that only the Fifth Amendment can be relied upon by a witness." The subcommittee chairman thereafter made it clear that the subcommittee was not depriving any of the witnesses of the right to raise any proper objection including all of the amendments. Appellant stood squarely upon the First Amendment. He at no time claimed the protection of the Fifth Amendment. Appellant was not prejudiced in any way by the original incorrect statement.

Sec. 192, Title 2, U. S. Code, makes it a criminal offense for a witness before a committee of either House of Congress in any matter under inquiry by such committee to

refuse "to answer any question *pertinent* to the question under inquiry." (Emphasis added.) We agree with appellant's construction of the statute that in such a hearing part of the standard of criminality is the pertinency of the questions propounded to the witness, that the witness is entitled to be apprised of the object of the inquiry so as to show the connective tissue between the questions asked and the claimed power of the committee, and that the witness must be apprised that the committee demands his answer notwithstanding the objections made by the witness to answering the question. *Watkins* v. *United States*, supra, 354 U. S. 178, 187, 198, 208; *Quinn* v. *United States*, 349 U. S. 155, 165-166. However, we do not agree with his contention that these standards were not complied with.

The acting chairman of the subcommittee in his opening remarks stated that the committee was operating under a printed set of rules which would be scrupulously observed throughout the proceedings, that each witness would be permitted to have counsel sit alongside of him at the table, that counsel would be permitted to advise the witness on his constitutional rights as the hearing progressed, and that if the witness desired, an informal recess would be called so that the witness might counsel at length with his attorney. He also made the following statement,

> "Now, the last thing the committee wants to emphasize is the fact, oft repeated but many times misunderstood, and that is, we are not engaged in an investigation of any institution, educational or otherwise. We are not investigating labor unions. We are not investigating any particular group or stratum; we are concerned primarily with collecting information that will aid and assist the Congress of the United States in the enactment of legislation to cope with the Communist threat to our peace and security,

> and in consonance with that we shall expect each and every witness who takes the stand to observe the rules as they have been laid out and to cooperate with this committee."

During the early part of the questioning of the appellant the following statement was made by the committee counsel,

> "Dr. Robert Gorham Davis testified at some length before this committee regarding the conduct of Communist Party affairs at Harvard during the period he was acquainted with it, he having been a member of the Communist Party at Harvard. The question of influence upon the faculty members upon the student body was discussed by him. He told the committee that at the time he was a member there was no direct connection between the faculty members and the student body on the subject of communism for security reasons. We are very anxious to investigate that situation fully and as at late a period as possible. We want to know from you, if you have knowledge of it, whether or not there was any relationship between the faculty members of the Communist Party and student body members of the Communist Party at Harvard and what influences were brought to bear by one group upon the other."

The evidence also clearly showed that in asking the questions of appellant the subcommittee was following up the recommendations of the Committee on Un-American Activities of the House through prior years in relation to bills which had been recommended at previous Congresses for enactment, and that certain matters of legislation were under consideration at the time of the inquiry.

As a matter of fact, appellant's objection to answering

the question was not based on any failure to be advised of the object of the inquiry or that the questions asked were not pertinent to the inquiry. He stated to the subcommittee, "I have taken pains to inform myself on all important political issues. I will not discuss with the committee what conclusions I reached or what methods I used to inform myself." He also said, "I believe that when you direct me to answer a question concerning my political beliefs or my political affiliations, that is entirely without force." He explained, "It seems to me that such a question infringes my freedom of speech. It infringes my freedom of speech because it seeks to oblige me to discuss my political activities and my political opinions under highly abnormal circumstances. This is not the way you discuss politics for the purpose of arriving at the truth * * *. Therefore I claim that this question is improper since it exceeds the authority of Congress. It oversteps the bounds placed on Congress by the first amendment. Therefore, I am under no compulsion to answer."

We are of the opinion that the appellant was fully apprised of the object of the inquiry which was within the power of the committee and that the questions asked were pertinent to the object of the inquiry. *Barenblatt v. United States*, supra, 252 F. (2) 129, 134-136, C. A. D. C., affirmed, 360 U. S. 109.

Appellant contends that the conviction cannot be sustained because the subcommittee failed to comply with the rule stated by the Supreme Court in *Quinn v. United States*, supra, 349 U. S. 155, 166, as follows: "* * * unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under Sec. 192 for refusal to answer that question." In that case the Court was of the view that it was apparent from the transcript of the hearing that the committee's position was ambiguous, that the appellant was

never confronted with a clear-cut choice between answering the question and risking prosecution for contempt, and that at best he was left to guess whether or not the committee had accepted his objection. We do not think that the proceedings in the present case are properly subject to that construction. The subcommittee made it clear to the appellant that they wanted certain information from him. Appellant left no doubt about his refusal to give the subcommittee this information. In addition to the statement hereinabove referred to, the appellant stated in answer to the question embodied in the first count of the indictment, "That is a question concerning my political associations I believe and I will refuse to answer all such questions before this committee." The appellant also stated before the second question was asked, "* * * and I will refuse to answer any questions of this nature." With respect to the questions asked in counts 10, 11, 16, 17, 19, 20, 21, 22, 24, and 25, the appellant expressly stated that he refused to answer or would not answer.

The subcommittee also made it clear that it was not acquiescing in appellant's refusal to answer the questions. Prior to the asking of the question embodied in the 16th count, a committee member said, "The witness is obviously in contempt of the Congress of the United States", to which the chairman replied, "There is no doubt about that. He has been in contempt all day here." As stated by the Court in *Quinn* v. *United States*, supra, 349 U. S. 155, 170, "Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate interests of both the witness and the committee. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain." Appellant's posi-

tive, unqualified statements clearly indicated his position and his refusal to answer, regardless of the subcommittee's ruling.

In any event, it appears that there were express directions to answer the questions forming counts 1, 13, 15, 18, 22, and 24. Since a conviction under any one of the twenty-six counts would sustain the judgment imposed in this case, the failure, if any, to expressly direct the appellant to answer the question forming the basis of another count, does not invalidate the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Polidfico* v. *United States*, 237 F. (2) 97, 112, C. A. 6th; *Kelleher* v. *United States*, 35 F. (2) 877, 879, C. A. D. C.

Although we concur in the view that each count of the indictment constituted a separate offense, *United States* v. *Orman*, 207 F. (2) 148, 160, C. A. 3rd; *Newman* v. *United States*, 212 F. (2) 450, 452, C. A. 6th, we find no merit in appellant's contention that the District Judge erred in treating the twenty-six counts of the indictment as constituting a single offense and in imposing only one judgment. It is ordinarily desirable that a separate sentence be imposed under each count of an indictment on which a conviction is had, but a single or general sentence on two or more offenses charged in the same indictment, without apportioning the sentence to the respective counts in the indictment, is not illegal, provided the sentence imposed is not in excess of the maximum allowed by law for all the offenses of which the defendant is guilty. *Jackson* v. *United States*, 234 F. (2) 605, C. A. 6th; *Hamilton* v. *United States*, 204 F. (2) 927, 928, C. A. 4th, cert. denied, 346 U. S. 858; *Levine* v. *Hudspeth*, 127 F. (2) 982, 984, C. A. 10th, cert. denied, 317 U. S. 628; *Phillips* v. *United States*, 212 F. (2) 327, 335, C. A. 8th; *McKee* v. *Johnston*, 109 F. (2) 273, 275, C. A. 9th. The single sentence im-

posed in the present case was not in excess of the maximum allowed for any one count.

The judgment is affirmed.

This case was argued to a panel of the court consisting of Miller and Stewart, Circuit Judges, and Jones, District Judge. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He therefore did not participate in the decision, opinion, or judgment in this case.

## Appendix C

### Judgment of the Circuit Court, August 21, 1959

Appeal from the United States District Court for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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IN THE

# Supreme Court of the United States

October Term, 1959

No. 456

HORACE CHANDLER DAVIS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## MOTION FOR LEAVE TO FILE AN AMENDED PETITION AND AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No. 456**

HORACE CHANDLER DAVIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A petition for a writ of certiorari has already been filed in this case. Petitioner now moves for leave to file the following timely amended petition for a writ of certiorari. The ground of this motion is that the original petition was written by petitioner without counsel and did not fully clarify the various questions presented nor adequately set forth all of the reasons which require that the case be reviewed.

## AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*.

Horace Chandler Davis prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on August 21, 1959.

* For the convenience of the Court the substance of our original petition is incorporated into this amended petition.

## Opinions Below

The opinion of the District Court for the Western District of Michigan is not officially reported. It appears at page 62a of the Joint Appendix (R. 62). The opinion of the Court of Appeals for the Sixth Circuit (pp. 15-23, *infra*) is reported at 269 F. 2d 357.

## Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on August 21, 1959 (p. 24, *infra*). On September 16, 1959, Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to and including October 20, 1959. The jurisdiction of this Court is invoked under 28 U. S. A. § 1254(1).

## Questions Presented

1. Whether, in light of the First Amendment to the United States Constitution, an investigating committee of the Congress of the United States has power to compel testimony by a private citizen as to his ideas, or as to his associations and activities directed to recommending his ideas to others.

2. Whether, in light of the First Amendment, an investigating committee of the Congress has any governmental authority whatever to conduct a public hearing designed to directing unreasoning scorn, obloquy and ridicule by the public upon a political doctrine, and upon a witness if he does not repudiate the doctrine.

3. Whether House Rule XI, defining the powers of the House Committee on un-American Activities, has been construed and applied in violation of the constitutional principle of separation of legislative, judicial and executive powers.

4. Whether the entire proceeding resulting in petitioner's conviction is unconstitutional as a bill of attainder within the prohibition of Article I, Section 9, clause 3 of the Constitution.

5. Whether House Rule XI is unconstitutional by reason of the fact that it has been consistently construed by the House Committee on un-American Activities to authorize the attainder of persons because of their political views and associations.

## Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution, Article I, Section 9, Clause 3 of the Constitution, as well as 2 U. S. C. § 192 and the relevant portions of Rule XI of the House of Representatives, H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18, are set forth in Appendix A, *infra*, pp. 13-14.

## Statement

Petitioner, a mathematician then teaching at the University of Michigan, appeared pursuant to subpoena on May 10, 1954 in Lansing, Michigan, before a subcommittee of the House Committee on un-American Activities (*Hearings,* 5349). He was not accompanied by counsel.

The subjects of his interrogation fall into three areas:

1. Petitioner's political views and associations, especially while he was a student and graduate student at Harvard (*Hearings,* 5349-5359).

2. The author, sponsor and circumstances surrounding the publication of "Operation Mind", a pamphet attacking the Committee (*Hearings,* 5359-5366).

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* We thus refer to the hearings entitled "Investigation of Communist Activities in the State of Michigan—Part 6." Petitioner's testimony appears at pages 5349-5371 of these hearings which were introduced in evidence as Exhibit 8 at the trial (R. 60).

3. Petitioner's failure to protest or appeal an action of the State Department revoking his passport as the result of information from an unnamed informant (*Hearings*, 5367-5370).

Petitioner, relying solely on the guarantees of the First Amendment, resisted interrogation about his political views and associations on the ground that the Committee lacked power to compel testimony in this area. He stated (*Hearings*, 5350):

> "I wanted to explain in what respect I believe that this question exceeds your authority. It seems to me that such a question infringes my freedom of speech. It infringes my freedom of speech because it seeks to oblige me to discuss my political activities and my political opinions under highly abnormal circumstances. This is not the way you discuss politics for the purposes of arriving at the truth. These are abnormal circumstances. I am under oath where I have to watch every word. In addition, I think that it infringes freedom of speech because it focuses attention in the evaluation of political ideas or of individuals on how close they are to Communist ideas or to the Communist Party, and thereby takes attention off the question of whether the ideas are right and the question of the worth of the individuals. I believe that this stifles the type of discussion which is necessary in a democracy in order that the people may arrive at the conclusions which are in accordance with their will.
>
> Finally, I would claim that in addition to these two respects it also infringes the freedom of speech of people who are not on the stand. It infringes the freedom of speech of everyone in that it acts as a threat—it implies a threat that if their opinions are not such as to meet with the favor of this committee, they may be subjected to the same sort of treatment that the witnesses today are being subjected to, and in that respect it opens the way to stigmatization of political views which would lead the citizens to make political choice on the basis of fear rather than on the basis of reason.

> Now, I would claim that it is highly essential to a democracy that this freedom of political choice be preserved; in fact, that this is the freedom which the first amendment is designed to protect. Therefore I claim that this question is improper since it exceeds the authority of Congress. It oversteps the bounds placed on Congress by the first amendment. Therefore, I am under no compulsion to answer."

And again (*Hearings*, 5351):

> "I would like to explain that in my opinion not merely do I have the right to refuse to answer a question which has been improperly made, but that furthermore it is highly desirable for me to refuse to answer questions concerning my politics before this committee. If I were to answer these questions, I would be contributing to the precedent that everyone must, on demand by this committee, state his political position, his political affiliations, and therefore I would be contributing to the precedent that people's political activities must be judged in terms of labels rather than in terms of their content. This, I think, does injury to the first amendment, and therefore my preference not to answer is based on desire not to oppose the first amendment myself."

For a related reason he challenged the Committee's power to require him to identify his friends and associates (*Hearings*, 5354-5355):

> "My point is this: If witnesses are to be compelled to state before this committee who their friends and associates are under circumstances where the witnesses themselves are purported to be particularly shocking people, in other words, in connection with witnesses such as myself who refuse to answer some of the committee's questions, then the tendency will be, of course, first, for people to dislike being named before the committee in this way, and second, for them to avoid in the future association with anyone who might perhaps be a witness before this committee and refuse to answer some questions. This

constitutes definite pressure on them to choose only certain friends, only those who would be cooperative with the committee or who would not be called. This type of pressure is a restriction on their freedom under the first amendment to have whatever associations they please, and therefore I claim that this question in itself is improper as the other one was, and I would refuse to answer. In addition, if there is any intimation that the question concerned my political affiliations, then it would be even more improper because it would be a violation of the first amendment in the same way as other political questions would. That is my understanding of the Bill of Rights."

Petitioner was indicted in 26 counts under 2 U. S. C. § 192. He was tried without a jury before the District Judge, who found him guilty, and imposed a fine of $250 and a jail sentence of six months. Appeal was taken to the Court of Appeals, which affirmed the conviction, relying on *Barenblatt* v. *United States*, 360 U. S. 109.

## Reasons for Granting the Writ

1. This Court based its decision in *Barenblatt* v. *United States*, 360 U. S. 109, on an interpretation of the First Amendment limitations upon Congress which is in conflict with its holding in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642. The conflict can be resolved only if considered anew by this Court.

2. That speech which the First Amendment was primarily intended to protect is exchange of opinion between citizens on matters of public policy as a necessary preliminary to formulating the will of the electorate. The protection of this category of speech by the First Amendment may not be subordinated to any governmental exigency; for the government's power derives from the will of the people. "If we advert to the nature of Republican

Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Madison, Annals of Congress, 3d Cong., 934. See also Meiklejohn, Free Speech and its Relation to Self-Government, 25, 26. Despised or anti-democratic opinions are included among those protected, that they may enter into the contention of ideas from which the people's decisions emerge. *United States* v. *Roth*, 354 U. S. 476, 484. See also Mill, On Liberty.

3. The House Committee on Un-American Activities investigates primarily "subversive and un-American propaganda"—which can only mean advocacy before the citizenry of certain censured ideas. H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18 (pp. 13-14, *infra*). The usual interrogation by the Committee, and in particular the interrogation of the petitioner in the present case, confronts the witness with the suggestion that he has advocated, or belonged to organizations which advocated, the "un-American" ideas. This is in effect a test oath, a demand that the witness either repudiate the ideas, or accept the opprobrium attached to them by avowing them or refusing to answer. By conducting the hearings publicly the Committee apprises the people that to entertain "un-American" ideas is dangerous. *Watkins* v. *United States*, 354 U. S. 178, 197. The additional message, that to entertain these ideas is shameful or disgusting, is equally intolerable: an agency of government may urge upon the people reasons for favoring one side or another of an issue, but may not urge the people to withdraw from considering the issue at all.

4. The described violation of the First Amendment could not be removed by the Committee's operating under a reworded charter, or altering its forms, so long as the nature of the hearings was unaltered. The violation occurs as soon as the hearing becomes a political test oath and

expose; regardless of the witness' response, the proceeding is invalidated. There can be no crime of contempt for refusal to cooperate with an invalid proceeding.

5. The question is important because the Committee's hearings continue to the present to reflect the same repressive pattern and to inflict the same injury upon the people's free speech. The injury of which we speak is not abstract or speculative. The Committee's activities and the resolution authorizing those activities have brought fear and conformity not only to the political process but also to the campus, the laboratory, the studio, indeed, to every area of conduct which depends for its vitality and functioning upon the freedom with which investigation may be undertaken and ideas exchanged. If the petition is granted, we propose to document this proposition by proofs drawn from every area in which the Committee has functioned.

6. In *Barenblatt, supra*, the Court declined responsibility for curbing the abuses of the Committee on the ground that this is a matter for the voters. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 377-378. But the record makes it quite clear that petitioner was called before the Committee because the Committee thought he was responsible for writing and distributing a pamphlet attacking the Committee (*supra*). Indeed, counts 12 to 21 of the indictment deal with this pamphlet which, in the language of the indictment, "called upon people to oppose the Committee's presence in the Detroit area * * * " (R. 10). The Court has thus created a serious constitutional impasse. It has remitted the curbing of the Committee's activities to a mechanism which cannot function because the Committee prevents it from functioning.

7. Nor should it be thought that this case is an isolated example of this impairment of the process of opinion formation and political expression. The Committee

consistently subpoenas and attacks those identified with resistance to it and its activities:

(a) In the very hearing which gave rise to this proceeding the Committee thus interrogated a witness (*Hearings*, 5343):

> "Dr. Edward U. Condon was a witness before the Committee on Un-American Activities. It is our understanding from the investigation of the staff that at a meeting of the American Society of Pharmacology and Experimental Therapeutics, Inc., that you offered a resolution in connection with the Condon matter in which you condemned congressional investigation in that field.
>
> "Please do not misunderstand me; I am not in any way criticizing any individual for criticizing this committee or any other committee of Congress. But what I want to know is whether or not there were any Communist Party links to the resolution which you offered there and the action that was taken by that group."

(b) At the same hearing a second witness was thus interrogated (*Hearings*, 5398):

> "Mr. Tavenner: The Committee heard evidence from one of the witnesses today—I believe it was Dr. Davis—regarding the publication of a pamphlet entitled 'Operation Mind', which was distributed just as the Committee on Un-American Activities began its work in Detroit in 1952. Are you aware of the making of a plan for the preparation of a second booklet or pamphlet designed to serve the same purpose when the committee came to Detroit last week?
>
> • • •
>
> "Mr. Clardy: Witness, commencing with my arrival in Detroit week before last, there appeared in the newspapers, particularly in Detroit, a continuing series of statements all constituting attacks upon the committee and upon its members as individuals, spaced at the rate of about one a day, clear

> up to and through the time that we were appearing at Detroit. Did you take part in the strategic planning that resulted in the issuance of those attacks upon the committee?"

(c) In a recent hearing (*Communist Activities in the South*, July 1958), a witness was subpoenaed and sought to be discredited on the ground that he had been trying to develop "a hostile sentiment to this Committee and its work". As the Counsel for the Committee stated:

> "Indeed it is the fact that you were not even subpoenaed * * * until we learned that you were in town for [the] very purpose [to bring pressure upon the United States Congress to preclude these particular hearings]." (*Hearings*, 2681-2687)

A second witness was extensively interrogated about his efforts to oppose the Committee and his relationship to organizations in opposition to the Committee (*id.*, 2667-2681).*

(d) In another recent hearing in Chicago two witnesses were subpoenaed for the sole purpose of interrogating them about a leaflet attacking the Committee and its abuses (*Communist infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois Area*, May, 1959, pp. 532-560).

(e) A leader in an organization actively opposing the Committee was subpoenaed as he was about to address a public meeting protesting a Committee hearing. See *United States* v. *O'Connor*, D. C., D. N. J., Crim. No. 232-59, indictment pending; also *Hearings, Communist Infiltration and Activities in Newark, N. J.* (September, 1958).

It will not do to dismiss these and other instances of the use of Committee process to punish its opponents by

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* Both of the witnesses referred to in the text were indicted and convicted of contempt. Their appeals are now pending in the Court of Appeals for the Fifth Circuit. See *Wilkinson* v. *United States*, No. 17,723, and *Braden* v. *United States*, No. 17,705.

relying on the Committee's excuse that opposition to the Committee is a "Communist technique" which justifies the use of compulsory process. This Court could hardly have meant that the people have a right to protest against the abuses of a government agency except in those instances when the agency decides that the group attacking it is using Communist techniques.

8. The Committee has for 21 years been conducting a non-stop investigation into subversion. This marathon inquiry has resulted in the subpoenaing of thousands of unfriendly witnesses, some two or three times. We contend that the Committee has emerged from its activities through the years as a new kind of institution or power system in the American governmental structure. It is not a legislative body or an investigating Committee; it functions as a tribunal to adjudicate the political orthodoxy of those whom it subpoenas. All the Committee's procedures, its relationship to the press, the timing and location of its hearings, its enormous dossier apparatus, the chronic informer witnesses who feed it "names", its use of the contempt sanction against those who refuse to name others, its creation of new forms of associational guilt, its index of condemned organizations, the frequent use of its process retributively or for private ends, its clearance procedure—all of these are unified and explained by the fact that the Committee has usurped the powers of law enforcement. This can be readily demonstrated on review of this case.

9. The reasons why the Committee conducts legislative trials are not inscrutable. These trials are conducted to expose, punish, blacklist and do injury to the unfriendly witnesses who are forced to appear before the Committee. The Committee does not leave the punishment of these individuals to chance. It undertakes systematic propaganda, independently of its investigating activities, to prevent rational consideration of the views which it opposes. An additional result of this propaganda, which takes the form

of "Reports", "Consultations", "Press Releases", and similar devices, is to ensure maximum punishment of the Committee's victims through the creation of an inflamed public opinion.

The punishment which the Committee decrees ranges from loss of livelihood to public degradation. If Congress as a whole legislated in the manner in which the Committee "investigates", no one would question that such acts would constitute attainders. Cf. *Cummings* v. *Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 371. Surely the constitutional prohibition against attainders cannot be defeated by stratagems and concealment.

10. We urge the Court to review this case in order to clarify the pronouncements of the *Barenblatt* case on the subject of the First Amendment. Does the *Barenblatt* decision mean that there are no constitutional limitations upon the powers of congressional committees in connection with the investigation of Communists, suspected Communists or ex-Communists? The Court relies upon a judgment of Judge Hand in *United States* v. *Dennis*, 183 F. 2d 201, 213, about world affairs. But this judgment was made in 1950. Surely the Court cannot today place constitutional rights on a cold war footing in disregard of more recent developments.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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## Appendix A

CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9, CLAUSE 3:

No Bill of Attainder or ex post facto law shall be passed.

UNITED STATES CODE, TITLE 2, SEC. 192:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

EXCERPTS FROM RULES OF THE HOUSE OF REPRESENTATIVES, 83d CONGRESS, RULE XI, 17(b):

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from

foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

* * *

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary * * *.

## Appendix B

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED AUGUST 21, 1959

The appellant was indicted under a twenty-six count indictment for contempt of Congress in violation of Sec. 192, Title 2, U. S. Code. He was tried by the Court without a jury. The District Judge treated the twenty-six counts as charging only one offense, made a finding of guilty, and imposed a fine of $250.00 and imprisonment for a period of six months. Judgment was stayed pending this appeal.

Appellant had been a student at Harvard College from 1942 to 1945 and had received his B. S. degree therefrom. He received the degree of Ph. D from Harvard University in 1950. Thereafter, he had been employed as a teacher of mathematics at the University of Michigan.

Count 1 of the indictment states that a standing Committee on Un-American Activities was duly elected and certified by the House of representatives of the 83d Congress of the United States in accordance with the provisions of Public Law 601, 79th Congress, Chapter 753, 2nd session, known as the Legislative Reorganization Act of 1946; that beginning on February 23, 1953, said Committee commenced public hearings into "Communist Methods of Infiltration into Education", in accordance with provisions of Public Law 601 and the authority and power of said committee, as provided by Rule XI of House Resolution No. 5; that thereafter, on May 10, 1954, public hearings were held in Lansing, Michigan, by a duly appointed and authorized subcommittee of said Committee on Un-American Activities; that the appellant appeared before said subcommittee on May 10, 1954; that during the course of said hearing appellant was asked the following pertinent question to the inquiry:

> "During the period of time that you were at Harvard as an undergraduate, say between 1942 and 1945,

were you aware of the existence on the campus or in Cambridge of an organized group of the Communist Party made up chiefly of members of the student body of Harvard?"

and that the appellant deliberately and intentionally refused to answer said question claiming privilege under the First Amendment to the Constitution of the United States and persisted in such intentional refusal although directed to answer.

Each of the remaining counts incorporated the allegations of the first count with respect to the creation of the standing Committee on Un-American Activities and its subcommittee and the hearing on May 10, 1954, and in addition stated that the appellant was asked another pertinent question to the inquiry which he deliberately and intentionally refused to answer.

The questions set out in counts 1 through 11 dealt with alleged Communist activities at Harvard University and the appellant's awareness of the existence of such groups and certain named persons as having been active in such groups. The questions set out in counts 12 through 20 dealt with appellant's connection with and participation in the dissemination of a pamphlet entitled "Operation Mind" which called upon the people of Detroit to oppose the Committee's presence in the Detroit area, and which bore the notation, "Distributed by University of Michigan Council of the Arts, Sciences, and Professions, and the Civil Liberties Committee of the University of Michigan." The questions in the remaining counts dealt with certain political beliefs and associational activities of the appellant including the question whether the appellant had any time during 1952 or 1953 solicited membership in the Communist Party of any faculty member or student of the University of Michigan, whether the appellant was a member of the Communist Party and whether he had ever been a member of the Communist Party. The appellant filed a

motion to dismiss the indictment, which was overruled by the District Judge, and also entered a plea of not guilty.

There is no factual dispute between the parties, and the appeal presents purely a question of law. The case was argued to this Court on April 21, 1958, but due to the pending review in the United States Supreme Court of the case of *Barenblatt* v. *United States*, 252 F. (2) 129, C. A. D. C., cert. granted, 356 U. S. 929, which involved some of the same issues as are raised in this case, a ruling on the present appeal was held in abeyance until the Supreme Court decided *Barenblatt*. Its opinion in *Barenblatt* v. *United States* was handed down on June 8, 1959, and is reported at 360 U. S. 109.

Appellant first contends that the Committee was acting under an excessively broad charter, which exceeded the bounds of legislative power; that when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter; that the authorizing resolution of the Un-American Activities Committee and Rule XI which authorized the subcommittee were so broadly drafted and loosely worded as to fail to point out with sufficient particularity the Committee's jurisdiction and purpose, thus violating the rule against vagueness. *United States* v. *Rumely*, 345 U. S. 41; *Watkins* v. *United States*, 354 U. S. 178, 200-205. This contention has been decided adversely to appellant's contention in *Barenblatt* v. *United States, supra.*

The decision in *Barenblatt* v. *United States, supra,* also disposes of appellant's contention that his conviction in this case violates the freedoms of speech and of the press guaranteed by the First Amendment.

In his opening statement the chairman of the subcommittee made the following statement,

> "However, if any witness desires to decline to answer any question propounded, if that witness will so indicate, not through counsel, but through his own

> words, the fact that he does object, that will be duly noted and recorded. I must caution the witnesses, however, that the committee will recognize as an objection only the Fifth Amendment. We are repeatedly confronted by witnesses who invoke practically all the amendments and the entire Constitution itself."

Appellant contends that this assumption of an absolute power to investigate subject only to the Fifth Amendment was an unwarranted usurpation of power, in that the power to investigate is subject to the First Amendment as well as the Fifth, and that apppellant's resistance thereto was accordingly lawful. *Watkins* v. *United States,* supra, 354 U. S. 178, 188.

The statement referred to is not properly relied upon. Committee member Moulder promptly thereafter made the statement, "I want the record to show that I disagree with the chairman's position that only the Fifth Amendment can be relied upon by a witness." The subcommittee chairman thereafter made it clear that the subcommittee was not depriving any of the witnesses of the right to raise any proper objection including all of the amendments. Appellant stood squarely upon the First Amendment. He at no time claimed the protection of the Fifth Amendment. Appellant was not prejudiced in any way by the original incorrect statement.

Sec. 192, Title 2, U. S. Code, makes it a criminal offense for a witness before a committee of either House of Congress in any matter under inquiry by such committee to refuse "to answer any question *pertinent* to the question under inquiry." (Emphasis added.) We agree with appellant's construction of the statute that in such a hearing part of the standard of criminality is the pertinency of the questions propounded to the witness, that the witness is entitled to be apprised of the object of the inquiry so as to show the connective tissue between the questions asked and the claimed power of the committee, and that the wit-

ness must be apprised that the committee demands his answer notwithstanding the objections made by the witness to answering the question. *Watkins* v. *United States*, supra, 354 U. S. 178, 187, 198, 208; *Quinn* v. *United States*, 349 U. S. 155, 165-166. However, we do not agree with his contention that these standards were not complied with.

The acting chairman of the subcommittee in his opening remarks stated that the committee was operating under a printed set of rules which would be scrupulously observed throughout the proceedings, that each witness would be permitted to have counsel sit alongside of him at the table, that counsel would be permitted to advise the witness on his constitutional rights as the hearing progressed, and that if the witness desired, an informal recess would be called so that the witness might counsel at length with his attorney. He also made the following statement,

> "Now, the last thing the committee wants to emphasize is the fact, oft repeated but many times misunderstood, and that is, we are not engaged in an investigation of any institution, educational or otherwise. We are not investigating labor unions. We are not investigating any particular group or stratum; we are concerned primarily with collecting information that will aid and assist the Congress of the United States in the enactment of legislation to cope with the Communist threat to our peace and security, and in consonance with that we shall expect each and every witness who takes the stand to observe the rules as they have been laid out and to cooperate with this committee."

During the early part of the questioning of the appellant the following statement was made by the committee counsel,

> "Dr. Robert Gorham Davis testified at some length before this committee regarding the conduct of Communist Party affairs at Harvard during the

> period he was acquainted with it, he having been a member of the Communist Party at Harvard. The question of influence upon the faculty members upon the student body was discussed by him. He told the committee that at the time he was a member there was no direct connection between the faculty members and the student body on the subject of communism for security reasons. We are very anxious to investigate that situation fully and as at late a period as possible. We want to know from you, if you have knowledge of it, whether or not there was any relationship between the faculty members of the Communist Party and student body members of the Communist Party at Harvard and what influences were brought to bear by one group upon the other."

The evidence also clearly showed that in asking the questions of appellant the subcommittee was following up the recommendations of the Committee on Un-American Activities of the House through prior years in relation to bills which had been recommended at previous Congresses for enactment, and that certain matters of legislation were under consideration at the time of the inquiry.

As a matter of fact, appellant's objection to answering the question was not based on any failure to be advised of the object of the inquiry or that the questions asked were not pertinent to the inquiry. He stated to the subcommittee, "I have taken pains to inform myself on all important political issues. I will not discuss with the committee what conclusions I reached or what methods I used to inform myself." He also said, "I believe that when you direct me to answer a question concerning my political beliefs or my political affiliations, that is entirely without force." He explained, "It seems to me that such a question infringes my freedom of speech. It infringes my freedom of speech because it seeks to oblige me to discuss my political activities and my political opinions under highly abnormal circumstances. This is not the way you

discuss politics for the purpose of arriving at the truth * * *. Therefore I claim that this question is improper since it exceeds the authority of Congress. It oversteps the bounds placed on Congress by the first amendment. Therefore, I am under no compulsion to answer."

We are of the opinion that the appellant was fully apprised of the object of the inquiry which was within the power of the committee and that the questions asked were pertinent to the object of the inquiry. *Barenblatt* v. *United States*, supra, 252 F. (2) 129, 134-136, C. A. D. C., affirmed, 360 U. S. 109.

Appellant contends that the conviction cannot be sustained because the subcommittee failed to comply with the rule stated by the Supreme Court in *Quinn* v. *United States*, supra, 349 U. S. 155, 166, as follows: "* * * unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under Sec. 192 for refusal to answer that question." In that case the Court was of the view that it was apparent from the transcript of the hearing that the committee's position was ambiguous, that the appellant was never confronted with a clear-cut choice between answering the question and risking prosecution for contempt, and that at best he was left to guess whether or not the committee had accepted his objection. We do not think that the proceedings in the present case are properly subject to that construction. The subcommittee made it clear to the appellant that they wanted certain information from him. Appellant left no doubt about his refusal to give the subcommittee this information. In addition to the statement hereinabove referred to, the appellant stated in answer to the question embodied in the first count of the indictment, "That is a question concerning my political associations I believe, and I will refuse to answer all such questions before this committee." The appellant also stated before the second question was asked, "* * * and I will refuse to answer any questions of this nature."

With respect to the questions asked in counts 10, 11, 16, 17, 19, 20, 21, 22, 24, and 25 the appellant expressly stated that he refused to answer or would not answer.

The subcommittee also made it clear that it was not acquiescing in appellant's refusal to answer the questions. Prior to the asking of the question embodied in the 16th count, a committee member said, "The witness is obviously in contempt of the Congress of the United States", to which the chairman replied, "There is no doubt about that. He has been in contempt all day here." As stated by the Court in *Quinn* v. *United States*, *supra*, 349 U. S. 155, 170, "Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate interests of both the witness and the committee. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain." Appellant's positive, unqualified statements clearly indicate his position and his refusal to answer, regardless of the subcommittee's ruling.

In any event, it appears that there were express directions to answer the questions forming counts 1, 13, 15, 18, 22, and 24. Since a conviction under any one of the twenty-six counts would sustain the judgment imposed in this case, the failure, if any, to expressly direct the appellant to answer the question forming the basis of another count, does not invalidate the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Poliafico* v. *United States*, 237 F. (2) 97, 112, C. A. 6th; *Kelleher* v. *United States*, 35 F. (2) 877, 879, C. A. D. C.

Although we concur in the view that each count of the indictment constituted a separate offense, *United States* v. *Orman*, 207 F. (2d) 148, 160, C. A. 3rd; *Newman* v. *United States*, 212 F. (2) 450, 452, C. A. 6th, we find no

merit in appellant's contention that the District Judge erred in treating the twenty-six counts of the indictment as constituting a single offense and in imposing only one judgment. It is ordinarily desirable that a separate sentence be imposed under each count of an indictment on which a conviction is had, but a single or general sentence on two or more offenses charged in the same indictment, without apportioning the sentence to the respective counts in the indictment, is not illegal, provided the sentence imposed is not in excess of the maximum allowed by law for all the offenses of which the defendant is guilty. *Jackson* v. *United States*, 234 F. (2) 605, C. A. 6th; *Hamilton* v. *United States*, 204 F. (2) 927, 928, C. A. 4th, cert. denied, 346 U. S. 858; *Levine* v. *Hudspeth*, 127 F. (2) 982, 984, C. A. 10th, cert. denied, 317 U. S. 628; *Phillips* v. *United States*, 212 F. (2) 327, 335, C. A. 8th; *McKee* v. *Johnston*, 109 F. (2) 273, 275, C. A. 9th. The single sentence imposed in the present case was not in excess of the maximum allowed for any one count.

The judgment is affirmed.

This case was argued to a panel of the court consisting of Miller and Stewart, Circuit Judges, and Jones, District Judge. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He therefore did not participate in the decision, opinion, or judgment in this case.

## Appendix C

JUDGMENT OF THE COURT OF APPEALS,
AUGUST 21, 1959

Appeal from the United States District Court for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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| Miscellaneous: | |
| 100 Cong. Rec. 11602 | 2 |
| 100 Cong. Rec. 11608 | 2 |
| Hearings before the Committee on Un-American Activities, House of Representatives, 83d Cong., 1st sess., February 25, 26 and 27, 1953 (*Communist Methods of Infiltration (Education)*) | 3 |
| Hearing before the Committee on Un-American Activities, House of Representatives, 83d Cong., 2d sess., May 10, 1954 (*Investigation of Communist Activities in the State of Michigan—Part 6 (Lansing)*) | 5 |
| H. Res. 665, 83d Cong., 2d sess. | 2 |
| Rule XI of the Rules of the House of Representatives, H. Res. 5, 83d Cong., 1st sess., 99 Cong. Rec. 18 | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 456

HORACE CHANDLER DAVIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 269 F. 2d 357 (Pet. 15–23).[1] The opinion of the District Court for the Western District of Michigan (J.A. 62a) is not officially reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1959 (Pet. 24). On September 16, 1959, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 20, 1959. A petition was filed on October 7, 1959; a motion for leave to file an amended petition and the amended petition were filed on October 19, 1959.

[1] "Pet." refers to the amended petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the charter of the House Committee on Un-American Activities empowers it to conduct an inquiry into the Communist Party's infiltration and penetration of the field of education.

2. Whether the action of the subcommittee in interrogating petitioner on this subject violated his constitutional rights under the First Amendment.

3. Whether petitioner's conviction may be attacked on the ground that the Committee members who questioned him had improper motives.

## STATUTE AND RULE INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Rule XI of the House of Representatives, H. Res. 5, 83d Cong., 1st sess., 99 Cong. Rec. 18, are set forth in Appendix A to the amended petition for certiorari (Pet. 13–14).

## STATEMENT

Petitioner was charged in a twenty-six-count indictment (J.A. 3a–17a) with having refused, in violation of 2 U.S.C. 192, to answer twenty-six questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives.[2] The

[2] The Committee had reported the petitioner's contumacy to the House of Representatives (100 Cong. Rec. 11602), and the House resolved that the Committee's report be certified to the United States Attorney. H. Res. 665, 83d Cong., 2d sess., set forth at 100 Cong. Rec. 11608.

questions set out in counts 1 through 11 dealt with alleged Communist activities at Harvard University and with petitioner's knowledge and information on this subject. The questions set out in counts 12 through 20 relate to petitioner's connection with a pamphlet entitled "Operation Mind," which called upon the people of Detroit to oppose the Committee's presence in the Detroit area. The questions in the remaining counts dealt, *inter alia,* with certain associational activities of the petitioner and included questions as to whether the petitioner was then, or ever had been, a member of the Communist Party (counts 25 and 26). Petitioner, having waived his right to a trial by jury (J.A. 1a), was found guilty by the court, which treated the twenty-six counts as charging only one offense (J.A. 68a). He was sentenced to six months' imprisonment and to pay a fine of $250 (J.A. 70a–71a). The Court of Appeals affirmed.

The pertinent facts may be summarized as follows:

On February 25, 1953, the Committee on Un-American Activities of the House of Representatives commenced a series of public hearings in connection with an investigation which it was conducting into "Communist Methods of Infiltration" into the field of "Education" (G. Ex. 7).[3] The aims, purposes and objectives of the committee were fully set forth by its chairman at the outset of the hearings. The statement concluded:

[3] Government Exhibit 7 is the printed transcript (part 1) of the Hearings before the Committee on Un-American Activities, House of Representatives, 83d Cong., 1st sess., February 25, 26, and 27, 1953, entitled, *Communist Methods of Infiltration. (Education).*

> The committee is equally concerned with the opportunities that the Communist Party has to wield its influence upon members of the teaching profession and students through Communists who are members of the teaching profession. Therefore, the objective of this investigation is to ascertain the character, extent and objects of Communist Party activities when such activities are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party [J.A. 56a–57a; G. Ex. 7, p. 3].

The Committee first called a number of witnesses who testified voluntarily concerning their knowledge of Communist Party work in the field of education. Illustrative of this testimony was that of the first witness, Dr. Robert Gorham Davis, who stated that, from 1937 to 1939, he was a member of a Communist cell on the campus of Harvard University which included faculty members, teaching fellows and graduate students (G. Ex. 7, pp. 4, 6). The members of this cell, Davis testified, would seek to attain positions of leadership in various organizations including the Teacher's Union (*id.*, pp. 10, 30) with the object that the policies of such organizations "be as close to the policies desired by the Communist Party as possible" (*id.*, p. 9). Dr. Davis further testified that the same techniques are being followed by Communists today (*id.*, pp. 13, 41).

During 1954, the Committee continued its inquiry into Communism in education. On May 10, 1954, petitioner, who was then a teacher at the University

of Michigan and who had been a student at Harvard University from 1942 to 1945 and had received a graduate degree there in 1950, was called by the subcommittee. He advised the subcommittee that he did not desire to have counsel (G. Ex. 8, p. 5348).[4] He testified that he was a teaching fellow at Harvard University from 1947 to 1948 (*id.*, p. 5353), but he refused to answer questions relating to Communist Party activity at Harvard (counts 1, 2) or to state whether he knew Dr. Robert Gorham Davis (count 3). Petitioner was then advised that Dr. Davis had testified before the Committee on February 25, 1953 regarding the conduct of Communist Party affairs at Harvard University at "a much earlier period" (*id.*, p. 5354), and that the Committee was "very anxious to investigate that situation fully and at as late a period as possible". A member of the Committee further stated that the Committee was considering "some proposed legislative proposals" and that answers that might be given by the petitioner "will be information the committee can use to very good effect" (*id.*, p. 5355). Petitioner persisted in his refusal to answer any question concerning Communist activity among the students or faculty at Harvard University (counts 4, 5) or concerning his membership in the Wendell Phillips Club of the Communist Party in Cambridge (count 6).

[4] Government Exhibit 8 is the printed transcript of the Hearing before the Committee on Un-American Activities, House of Representatives, 83d Cong., 2d sess., May 19, 1954, entitled, *Investigation of Communist Activities in the State of Michigan—Part 6 (Lansing)*.

In response to questions concerning the preparation and distribution of a pamphlet entitled "Operation Mind," which bore the notation, "distributed by University of Michigan Council of Arts, Sciences, and Professions, and Civil Liberties Committee of the University of Michigan" (counts 12–20), petitioner replied that he would not answer because it concerned his association with political groups (G. Ex. 8, pp. 5359–5360), stating further:

> I have taken pains to inform myself on all important political issues. I will not discuss with the committee what conclusions I reached or what methods I used to inform myself [*id.*, p. 5365].

Petitioner also refused to state whether he had solicited membership in the Communist Party of any faculty member or student of the University of Michigan (count 24), although specifically directed by the Committee to answer (G. Ex. 8, p. 5371).[5]

When questioned by the Committee as to his own past or present membership in the Communist Party (counts 25–26), petitioner refused to answer and specifically disclaimed reliance on the privilege against self-incrimination (G. Ex. 8, p. 5371).[6]

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[5] Petitioner was expressly directed by the Committee to answer the questions set out in counts 1 (G. Ex. 8, p. 5349), 13 (*id.*, p. 5360), 15 (*id.*, p. 5361), 18 (*id.*, p. 5363), 22 (*id.*, p. 5368), and 24 (*id.*, p. 5371).

[6] Petitioner at all times based his refusals on First Amendment grounds (G. Ex. 8, pp. 5360–5361, 5364, 5371; Pet. 4) and upon his assertion that the questions asked involved "political beliefs or associations" (*id.*, p. 5351; Pet. 4–5).

## ARGUMENT

Pending the outcome of *Barenblatt* v. *United States*, 252 F. 2d 129 (C.A.D.C.), certiorari granted, 356 U.S. 929, the Court of Appeals withheld decision in the instant case. Following this Court's affirmance in *Barenblatt*, 360 U.S. 109, it affirmed petitioner's conviction on the basis of the criteria set forth in the *Barenblatt* decision. We submit that *Barenblatt* is fully dispositive of the issues raised in this petition.

1. In *Barenblatt*, this Court affirmed the contempt conviction of a former teaching fellow of the University of Michigan who had refused to answer questions put to him by the same subcommittee which called this petitioner. The unanswered questions in *Barenblatt*, like many of those here, related to the witness' participation in, or knowledge of, alleged Communist Party activities at educational institutions (360 U.S. at 114).

Barenblatt had attacked the authority of the Committee to conduct an inquiry into the Communist Party's infiltration and penetration of the field of education (360 U.S. at 115). This Court reviewing the history of congressional action, held (pp. 120–121):

> In light of this long and illuminating history it can hardly be seriously argued that the investigation of Communist activities generally, and the attendant use of compulsory process, was beyond the purview of the Committee's intended authority under Rule XI.

The authority of the Subcommittee to investigate Communism in education, it concluded, was "unassailable" (*id.*, at 122).

Petitioner's attack upon the authority of the same subcommittee, engaged in a continuing investigation of the identical subject, is but an effort to relitigate an issue decided only last Term.

2. Petitioner argues that his rights under the First Amendment were violated by the investigation (Pet. 6–12). But, as the court below correctly ruled, the same contention was rejected in *Barenblatt* in which this Court unequivocally held that "investigatory power in this domain [Communist activity in the United States] is not to be denied Congress solely because the field of education is involved" (360 U.S. at 129).

3. Nor is this a case, as petitioner suggests, in which it may be said that the legislative body was engaged simply in "exposing" or "punishing" the witness.

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Petitioner's contention that the decision in *Barenblatt* conflicts with the holding in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, is unsound. In *Barnette*, this Court struck down a statute which would require a schoolchild to salute the flag under penalty of expulsion and criminal prosecution of the parents (319 U.S. at 629), regardless of the religious beliefs of the child or the parents. The Court stated "* * * freedoms of speech and of press, of assembly, and of worship * * * are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect" (*id.*, at 639).

The situation is indistinguishable from that in *Barenblatt*, a case in which the Court concluded that "the primary purposes of the inquiry were in aid of the legislative process" and that "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served" (360 U.S. at 133). Here, unquestionably, the subcommittee had reason to believe that petitioner possessed information directly relevant to its legislative purpose (J.A. 41a–53a), a fact which was pointedly made known to the petitioner (G. Ex. 8, pp. 5355, 5356).

Petitioner, indeed, made no objection to the subcommittee's questions on grounds of pertinency (G. Ex. 8, p. 5365); nor does he contend that he did not understand how the questions related to the subject under inquiry. Among the questions which petitioner refused to answer were questions as to his own Party membership—questions which this Court said in *Barenblatt* (360 U.S. at 125) were pertinent "beyond doubt." Thus, even if there were ground for challenging some of the twenty-six questions involved, the sentence would stand since it is less than the maximum authorized by the statute for conviction under any one count. *Barenblatt, supra*, 360 U.S. at 115; *Claassen v. United States*, 142 U.S. 140, 147; *Rogers v. United States*, 353 U.S. 53; *Whitfield v. Ohio*, 297 U.S. 431.

## CONCLUSION

In essence, petitioner is asking this Court to review questions decided in the same context only last Term, after full argument and deliberation. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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## REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION


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In contrast to the *Barenblatt* case which serves as the exclusive reliance of the Government, the dominant, if not the sole "probable cause" for the Committee's having called petitioner, is the allegation that he wrote and distributed a pamphlet, "Operation Mind", attacking the Committee. This case thus presents a dramatic illustration of the way in which the political process, which the First Amendment was designed to safeguard, has been undermined by the Committee under the claim of investigating for a legislative purpose. One is not required to depart from the standards of deference owed by the courts to the Congress to discern here the Committee's use of its powers for improper purposes.

The Government points to the fact that a year before petitioner was called, the Committee had heard testimony from one Robert Gorham Davis that he had been a Communist at Harvard from 1937 to 1939 (Opp.4-5). But

neither in the hearing nor at the trial did the Committee claim that Robert Gorham Davis' testimony referred in any respect to petitioner (who turned thirteen in 1939).

The Government points to the mention at the hearing of unspecified "legislative proposals" (G. Ex. 8, p. 5355). These turned out at the trial to number two. One was a bill denying the use of second class mailing privileges to the Communist Party or to Communist fronts (R.41). According to Congressman Clardy, "That tied in with 'Operation Mind' " (R.41), although there was no suggestion that "Operation Mind" had been mailed, second class or otherwise. The other was a bill to tighten limitations on use of United States passports (R.36-37). But what did the Committee's "inquiry into Communism in education", including the testimony of Robert Gorham Davis (Opp.4), have to do with second class mailing privileges or passports?

The Committee's activities would be unconstitutional even if cloaked by a plausible pretense of collecting information for legislative purposes. The pretense in this case is so far-fetched as to be altogether transparent, and the hearings can only be dealt with in terms of their true nature.

The Government misrepresents the argument of the petition (Opp.8). Petitioner's constitutional objections to the Committee's hearings (Pet.6-12) were not based on injury to himself; did not appeal only to the First Amendment, but also to the prohibition against Bills of Attainder; and did not rely on the special status of the field of education.

What is involved in this case, and in the some thirty cases now pending which share its issues, is no small matter. The hard fact is that the House Committee is seeking to transform the constitutional relationship of our government to the political process in ways that are both fundamental

and sinister. The Committee usurps executive and judicial powers in furtherance of its systematic attack on the prerogative of the people to decide freely matters of basic public policy. To hasten its transformation of our tripartite, democratic system into a bureaucratic apparatus for enforcing political conformity, the Committee needs to achieve autonomy. It is of the gravest importance that the Court refuse to yield its responsibility for the protection of constitutional liberty to the Committee's fraudulent rationale.

Respectfully submitted,

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